JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 692

DEMING NATIONAL BANK, a National Banking Corporation,
Petitioner,

vs.

MORRISON FLYING SERVICE, a Montana Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a Writ of Certiorari to the United States Circuit Court, 10th Circuit, to review a judgment of that Court entered May 17, 1968, Motion for Rehearing denied July 31, 1968. A transcript of the record in the cause being duly certified by the Clerk of the Circuit Court furnished herewith in accordance with Rule 21(1) of this Court.

REPORTS OF THE LOWER COURTS

The decision of the District Court granting appellant summary judgment was rendered February 27, 1964.

The first opinion of the United States Circuit Court, 10th Circuit, concerning this cause is found at 349 F.2d 430 where said Circuit Court reversed and remanded the lower United States District Court for New Mexico's action in granting of defendant appellant's motion for summary judgment. A copy of this opinion is attached as Exhibit "A" of the Appendix. The cause was afterwards tried by the Honorable H. Vearle Payne, United States District Judge for New Mexico, sitting without a jury. A copy of Judge Payne's unreported opinions being attached hereto as Exhibit "B" of the Appendix.

Upon judgment being granted for defendant, appellant, the plaintiff appealed again to the United States Circuit Court, 10th Circuit, which reversed the judgment of the lower court. This decision was entered May 17, 1968. At this time the opinion is still unreported but is attached hereto as Exhibit "C" of the Appendix. Defendant, appellant, filed a timely motion for rehearing which was denied August 31, 1968.

JURISDICTIONAL GROUNDS

1. The Circuit Court of Appeals, 10th Circuit, rendered the decision sought to be reviewed on May 17, 1968. A timely motion for rehearing was made by defendant, appellant. The motion was denied on July 31, 1968.

2. Review of the Circuit Court of Appeals' decision is sought on two grounds:

First, review of the 10th Circuit's decision is sought under Rule 19(1)(b) of this Court on the ground there is a

real, existing, and substantial conflict in the Circuit Courts of Appeal as to the proper construction of 28 U.S.C., Sec. 1655, on the issue of whether a general creditor who has neither reduced his claim to judgment nor has an express lien or pre-existing claim to property may invoke the aid of the statute to gain jurisdiction over a non-resident defendant.

Second, review is sought on the ground of the Court's supervisory powers over the lower Circuit Court of Appeals, 10th Circuit, which has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in accordance with Rule 19 for the following reasons:

(a) The 10th Circuit has wholly disregarded the District Court's findings of fact without the slightest attempt to show they were "clearly erroneous" as required by Rule 52(a) of the District Court Rules.

(b) The Circuit Court has arrived at an inequitable result not justified by accepted concepts of law or by the pleadings.

3. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Did the New Mexico Federal District Court have jurisdiction to enter a default judgment against Cisco Aircraft, Inc., and National City Aircraft Leasing Company, both non-resident defendants, under U.S.C., Sec. 1655?

II. Did the 10th Circuit Court violate Rule 52(a) of the United States District Court Rules in reversing the lower court's decision where it was not shown the lower court's findings of fact were clearly erroneous?

III. Did the Circuit Court misconstrue the law concerning the elements necessary to establish a contract between appellant, Deming National Bank and Morrison Flying Service to pay its claim?

IV. Did the evidence produced at trial create an equitable lien in favor of Morrison Flying Service in the proceeds belonging to Cisco Aircraft held on deposit by Deming National Bank?

STATUTORY LAW INVOLVED

There are but two federal statutes material to the cause. They are as follows:

(1) *28 U.S.C., Sec. 1655.* Lien enforcement; absent defendants:

> In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.
>
> Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.
>
> If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the

property is within another district, but within the same State, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just. June 25, 1948, c. 646, 62 Stat. 944.

(2) *Rule 52* (*a*) of the United States District Court Rules:

Findings by the Court:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

STATEMENT OF THE CASE

Early in 1962, the United States Department of Agriculture through the Forest Service advertised for bids on a contract for aerial spraying of timber land in Montana. Cisco Aircraft, Inc., was the successful bidder and on April 23, 1962, entered into a contract with the Government. Mr. Monroe, President of Cisco, contacted Morrison Flying Service about furnishing gas, oil, and some chase aircraft necessary in the performance of the contract, and an oral understanding was agreed to. In the meantime, Cisco had made application to Deming National Bank for a $20,000.00 line of credit for performing its contract, and had agreed to assign its payment of the Government contract to the Bank as security for the loan but in addition was required to secure a guaranty of the loan by Mr. Monroe, and three other persons. This was done. Morrison had knowledge of the intended assignment and wrote a letter dated May 9, 1962, as follows:

"Morrison Flying Service, Helena, Montana
May 9, 1962

"Deming National Bank,
Deming, N. M.

"Dear Sir:

"It is our understanding that the Forest Service Contract for spraying forests for spruce bud-worms has been assigned to your bank. We are sub-contractors under Cisco Aircraft, furnishing gas & oil as well as 5-8 Cessna 180 aircraft to be used as chase planes. The flying contract will probably be in the $6,000-$9,000 bracket and we are wondering if your bank could send us a letter assuring us of payment for our services.

"Under our contract with Cisco, they have agreed to pay us within 48 hours of their payment of this Forest Service contract. Is this agreeable with your bank?

Yours very truly,

EMH/eh E. Morrison Herrin, President"

Before receiving the Bank's reply, Morrison entered into a written contract of May 15, 1962, with Cisco, which contract reads as follows:

"AGREEMENT

May 15, 1962

"This agreement entered into this 15th day of May between MORRISON FLYING SERVICE, INC. and CISCO AIRCRAFT, INC, of Burbank, California, for the purpose of renting eight (8) Cessna 180 type aircraft and one (1) Stearman plus Forest Service qualified pilots for all aircraft. These aircraft and pilots are to be used as stated in U.S. Forest Service Contract No. 12-11-261-2002.

"Rental for the above named airplanes with pilot, gas and oil and insurance as specified by the above numbered contract will be as follows:

"Cessna 180 & 182	$30.00 per hr.
Stearman	$85.00 per hr.

"It is further agreed that Morrison Flying Service will furnish 100 Octane gasoline for .41 per gallon, which includes Montana Tax of .01, Federal Tax of .04 and Helena Airport Tax of .01 at the Joint-City-County Airport at Helena, Montana. They further agree to furnish Aviation oil for $1.50 per gallon. Gasoline will be furnished at White Sulphur Springs for .44 per gallon which includes both the State and Federal taxes. Gasoline storage tanks and a gasoline service man will also be furnished both at White Sulphur Springs, Montana, and Helena, Montana.

Payment for all services furnished will be made as follows:

"Within 48:00 hrs. of Cisco Aircraft, Inc. receipt of payment.

CISCO AIRCRAFT, INC.
/s John H. Bowman V. Pres.
MORRISON FLYING SERVICE, INC.
/s E. Morrison Herrin
President"

On May 21, 1962. Cisco executed a written absolute assignment of the proceeds of its spraying contract to the Bank. On June 11, 1962, the Bank replied to Morrison's letter of May 9, 1962, as follows:

"Deming National Bank
122 East Pine St., P.O. Box 511
Deming, New Mexico"

D. A. Sovell
President June 11, 1962

"Mr. E. Morrison Herrin, President
Morrison Flying Service
Helena, Montana

"Dear Mr. Herrin:

"In regard to your inquiry on the Forest Service contract between U.S. Forest Service and Cisco Aircraft. This contract has been assigned to the Deming National Bank and we are to act as paying agents for all the obligations assumed under this contract.

"I can assure you that once the money is received from the Forest Service, we will pay all the bills submitted, without delay.

Yours very truly,

DJS:mjb D. J. Sovell"

Morrison commenced performance of its sub-contract with Cisco on June 21, 1962. The performance was completed on July 24, 1962. After completion, Cisco's President, Mr. Monroe, a representative of the Government, and Mrs. Herrin, President of Morrison, met in Helena, Montana and agreed to the number of hours flown by Morrison, and a statement was mailed to the Bank showing an indebtedness due Morrison of $13,560.00. Later an additional item of $464.81 was discovered and another letter was sent to the Bank. The Bank has no knowledge of receiving either letter, but if it was received, it was turned over to Cisco as were all the bills incurred on the project. Various communications later occurred between Morrison and the Bank, the substance of which was that Morrison claimed the Bank had guaranteed their bill. This fact was denied by the Bank. In the meantime, Cisco made an absolute assignment of all proceeds subject to the Bank's indebtedness and a performance bond premium of $3,168.75 to National City Aircraft Leasing Co. Prior to receiving payment of the contract proceeds on December 24, 1962, the Bank sent Morrison its letter of October 9, 1962, which reads as follows:

"Deming National Bank
122 East Pine St., P.O. Box 511
Deming, New Mexico

D. J. Sovell
President

October 9, 1962

"Luxan & Scribner
Union Bank Building
Helena, Montana

"Attn: A. W. Scribner

"Gentlemen:

"In reply to your letter of October 1, 1962, this bank was assigned the monies from the Montana Bud Worm

Contract for the repayment of monies advance by the bank for this contract. We were further advised by Mr. Zack Monroe that the monies were to be used to pay bills for the expenses of performance of the contract. However, outside of the payment of our original advancements to Mr. Monroe, no funds can be paid by this bank except upon a check bearing his signature.

"I wrote you on June 11th concerning your bill in the belief that Mr. Monroe would sign checks for the payment of your bill when the funds had been received from the Federal Government. However, since completion of the job, an assignment of all funds due Mr. Monroe was executed by him to National Leasing and we have been directed by Mr. Monroe to pay all funds over and above the monies advanced by us, and the bond premium, to the attorney for National Leasing, Mr. Merryman. Also, since that time, we have garnishments from Von Carstad. However, since the assignment to National Leasing was received by us before the garnishment by Von Carstad, it is our belief that the assignment takes precedence.

"Under the circumstances, we cannot pay any sums without the approval of Mr. Zack Monroe and his assignee, National Leasing.

"We have not as yet received any funds from the Federal Government, but unless we are restrained through legal proceedings, we will have no recourse other than to pay the funds in accordance with the assignment made by Mr. Monroe to National Leasing.

"I very much appreciate your position with regard to payment of your client's bill; however, there is nothing I can do under the circumstances but to pay the money in accordance with the above, as soon as the money is received.

Yours very truly,

DJC:mjh D. J. Sovell"

Morrison did nothing further to protect its interest in the contract proceeds, although it knew the source of payment of the monies and that other creditors had secured direct payment by the Government for their services.

On payment being received December 24, 1962, the Bank reimbursed itself, paid the bond premium, and paid National City Aircraft Leasing Service $8,536.74 on its assignment, retaining $11,999.25 because of a garnishment in that amount against the Bank.

This suit against the Bank was filed on June 26, 1962. Summary judgment was rendered in the Bank's favor on February 27, 1964. An appeal was instituted by "Morrison" to the Circuit Court which reversed the District Court, its opinion being attached hereto as Exhibit "A" of the Appendix.

"Morrison" amended its complaint, joined Cisco Aircraft, National City Aircraft Leasing Co., and the United States Government which claimed a lien on "Cisco's" funds for withholding taxes, and by amendment claimed an equitable lien on the funds held by the Bank. Subsequently trial was had by the Court of the issues and a decision and judgment was entered, the Court's memorandum decisions being Exhibit "B" of the Appendix. "Morrison" again appealed and the Circuit Court reversed the lower court by its opinion attached hereto as Exhibit "C" of the Appendix.

REASONS FOR GRANTING A WRIT OF CERTIORARI

POINT I

In the instant case, the lower 10th Circuit Court permitted a general creditor, who had neither first reduced his claim to judgment nor has an express lien or pre-existing claim to property, to proceed under the provisions of 28

U.S.C., Sec. 1655, so as to obtain jurisdiction over non-resident defendants. Before proceeding into our argument dealing with the conflict in the circuits concerning whether the above was proper, we wish to respectfully point out the 10th Circuit, by its decision of May 17, 1968, improperly re-instated default judgments entered against Cisco Aircraft, Inc., and National City Aircraft Leasing Company, Inc., rendered pursuant to 28 U.S.C., Sec. 1655.

The default judgments were improperly re-instated since no proper service of process was ever accomplished against these defendants. In the case of Cisco Aircraft, Inc., while the New Mexico District Court by order of April 14, 1966, made provision for service of process by publication over same, the record is barren of any indication whatsoever such service was made. There is no affidavit of publication filed pursuant to such order.

In the case of National City Aircraft Leasing Company, Inc., the record is also barren of any proper service of process made. No return of service was ever made by a United States Marshal and filed of record. The Court may desire to know why it is of any concern to this defendant that judgments have been improperly entered against either "Cisco" or "National City." The answer is readily apparent when it is remembered that throughout this legal proceeding this defendant has refused to pay appellee, "Morrison", on the ground the funds held on deposit by it were not its own, but instead owned, by reason of an assignment from "Cisco" to "National City" by "National City." Thus, when the 10th Circuit improperly re-instated default judgments rendered against these defendants, it, in effect, determined appellant bank's non-payment of the funds held by it was improper.

The effect of the 10th Circuit's decision was to improperly re-instate judgments by default over necessary parties

to the law suit to this defendant's detriment. With the above in mind, the Court is directed to one of the central issues of the case, which is whether a lower court may enter a judgment obtained pursuant to 28 U.S.C., Sec. 1655, where the claimant, a general creditor, has not first reduced his claim to judgment in an in personam proceeding? It is appellant's position, he may not.

This Court is properly called upon to issue a Writ of Certiorari to decide this problem due to the fact a real, existing conflict in the circuits has arisen as to the proper scope of jurisdiction granted by 28 U.S.C., Sec. 1655.

The conflict in the circuits arises out of varying constructions of what is meant by, "an action in a district court to enforce a lien upon or claim to, . . . real or personal property within the district. . . ."

The 2nd, 4th, 5th, and 6th Circuit Courts of Appeals have held a general creditor may not use Sec. 1655 to gain jurisdiction over a non-resident defendant having neither first reduced his claim to a personal judgment, nor alleged facts which would establish an express lien or pre-existing claim to property, as distinguished from an in personam action which would involve a proceeding to create for the first time a claim to the property, as the effect of the proceeding itself. In this respect see:

Vidal v. *South American Security Co.*, (CCA 2nd, 1921) 276 Fed. 855

Wilson v. *Beard*, (CCA 2nd, 1928) 26 F.2d 860.

Spellman v. *Sullivian*, (CCA 2nd, 1932) 61 F.2d 787.

McQuillen v. *National Cash Register Co.*, (CCA 4th, 1940) 112 F.2d 877, cert. den. 311 U.S. 695, 61 S. Ct. 140, 85 L. ed. 450, rehear. den. 311 U.S. 729, 61 S. Ct. 316, 85 L. ed. 474.

Bank of Commerce & Trusts of Richmond, Va. v. *McArthur, et al.*, (CCA 5th, 1919) 156 Fed. 84.

Findlay v. *Fla. East Coast Ry. Co.*, (CCA 5th, 1932) 68 F.2d 540, cert. den. 292 U.S. 623, 54 S. Ct. 629, 78 L. ed. 1478.

Dry Clime Lamp Corp. v. *Edwards*, (CCA 5th, 1968) 389 F.2d 590.

Dan Cohen Realty Co. v. *Nat'l Savings & Trust Co.*, (CCA 6th, 1942) 125 F.2d 288.

Note: Most lower District Courts are in accord with these authorities.

Contrary to the above, the 7th and 10th Circuits have permitted such suits.

In this regard see:

Graff v. *Nieberg*, (CCA 7th, 1956) 233 F.2d 787.

Huntress v. *Huntress*, (CCA 7th, 1956) 235 F.2d 205.

Kelleam v. *Maryland Casualty Co.*, (CCA 10th, 1940) 112 F.2d 940, 312 U.S. 377, 61 S. Ct. 595, 85 L. ed. 899.

Shufford v. *Anderson*, (CCA 10th, 1965) 352 F.2d 755, cert. den. 383 U.S. 935.

This Court should resolve the above conflict in the circuits. Appellants contend Sec. 1655 should be construed so as to prevent a general creditor from using the statute as a means of creating a lien or claim to property as a result of the proceeding itself. Such a construction is both logical and would prevent the inequitable results present here.

A limited construction of Sec. 1655 is logical as the Federal Courts are courts of limited jurisdiction. See the *McQuillen* case, supra. The purpose of the statute was not to create a means of serving non-resident defendants in

any action. The purpose was to create a means of clearing title ownership in property located in a district, regardless of the residence of a defendant. Here, to require a plaintiff, such as "Morrison", to first reduce his claim to judgment where he has no possible claim to the funds other than might be created by the proceeding itself would be consistent with general rule; no service unless defendant is a resident of the jurisdiction.

Here, to have first required "Morrison" to have reduced its claim to judgment would not have been prejudicial. "Morrison" could have done so in either the federal courts or the state courts. The plaintiff could have commenced legal proceedings at the defendant's residence or in Montana inasmuch as substituted service have been accomplished under state law (see Montana Rules 4D).

A restrictive construction of Sec. 1655 would not have allowed the inequitable result of this case to arise. Reason: plaintiff would have had to establish the validity of his underlying claim for compensation from "Cisco" and priority to "National City's" assignment in an in personam proceeding before commencing suit against a defendant's property pursuant to Sec. 1655. Here, these issues were never litigated. In this respect, all the court decided was that plaintiff was entitled to the property held by appellant Bank. How, in any sense of justice, can it be said to be fair and equitable to require a non-resident defendant to come in and defend himself in some distant court so as to protect his property located there? It cannot! This especially is true when it is remembered the instant defendants "Cisco" and "National City" were not doing business in New Mexico. Their only tie to that state arose because they had deposited in a national bank, pursuant to an assignment which arose prior to plaintiff's claim, the proceeds of a Government contract.

In allowing plaintiff to proceed against these non-resident defendants pursuant to Sec. 1655, the 10th Circuit placed appellant Bank into a position which it was unable to properly defend. The 10th Circuit, in effect, forced appellant to either come in and defend not only its case, but also that of defendant's "Cisco" and "National City" or to be confronted with a determination it owed more money to plaintiff than it had on deposit. Such, in fact, is the result of the case.

It should be remembered the funds belonged to the Bank's depositor "Cisco", except for the amount of the Bank's loan. The Bank was forced with an assignment, valid on its face, from "Cisco" on the one hand, and on the other hand was confronted with a claim by "Morrison", for services which were unliquidated, the validity of which the Bank had no knowledge. How can it be held to be equitable to force the Bank to defend an action brought pursuant to Sec. 1655 under such circumstances? It cannot. It would seem just to have first required the plaintiff to have reduced his claim to judgment, before allowing him to proceed under Sec. 1655. This is especially so, when the purpose of the proceeding was to establish for the first time a claim to property.

POINT II

The 10th Circuit violated Rule 52(a) of the United States District Court Rules when it summarily reversed the lower court without first showing the District Court's findings of fact to be "clearly erroneous." See Rule 52(a), supra, which indicates, "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the present case, the sole reference by the 10th Circuit to the District Court's findings is confined to the following:

> "Actually, we find little conflict in the evidence adduced at the trial."

The 10th Circuit then proceeds to ignore the lower court's findings so that it may arrive at the result which it desired. Rule 52(a) was enacted so as to prevent such a result!

In this respect, this Court is called upon to exercise its supervisory powers granted to it by Rule 19(1)(b) of this Court and to thereby issue a writ of certiorari. Not only does this Court have a basis to issue such a writ, but there is a real need for it to do so in preventing the misapplication of accepted standards of justice.

It seems inopportune to go into at any great length the fact the trial court's findings were supported by ample, substantial evidence. What should be pointed out is the 10th Circuit substituted its own findings for the trial courts without even attempting to show the lower courts were clearly erroneous. Such conduct is expressly contrary to Rule 52(a) of the District Courts.

The Circuit Court held that the performance of the contract was beneficial to the Bank and this benefit constituted consideration for its agreement to pay. The Court failed to say how it was beneficial, but if it meant that performance of the contract between "Cisco" and "Morrison" was a benefit, this was directly contrary to the lower court's findings, Nos. 8, 9, and 10 to the effect that in making its loans to "Cisco" it relied on the financial statements, signatures on the note, and the three individual guarantors of such loans.

The Circuit Court further stated that " 'Morrison' suffered a detriment in going forward with performance rather than refusing to perform because of the questionable financial condition of 'Cisco' or seeking an extraordinary means of insuring payment prior to performance." This was contrary to the lower court's finding No. 13 wherein the trial court found:

> "It is true that plaintiff did not commence work until after June 11, 1962, but there was no evidence that it was waiting to hear from the Bank before performing. The plaintiff was already obligated to perform. The only detriment that the plaintiff could have suffered would have been that it could have applied to the Forest Service to pay the plaintiff direct, but there was no testimony that the Forest Service would have done that or that plaintiff suffered any damage or detriment as a result of the letter from the Bank."

It is also contrary to finding No. 14 that "Morrison" did not suffer any direct detriment; and that no reliance by "Morrison" on the Bank's letter was established. Furthermore, the Circuit Court's finding is contrary to the evidence which clearly showed that Mrs. Herrin had no reason to question the financial condition of "Cisco" until it had already commenced performance of its contract.

The Circuit Court's misunderstanding of the law concerning consideration for any agreement between the Bank and "Morrison" is discussed more fully in our Point III, infra.

The 10th Circuit further found the Bank's letter of June 11th constituted an express agreement the Bank would pay "Morrison" out of the proceeds of the Government contract. This is in direct opposition with the trial court's findings of fact, Nos. 11, 12, and 15. These findings may be summarized as holding the Bank, by its letter, intended to act as a paying agent; that the Bank had no authority

to pay any bill except as might be authorized by "Cisco"; and that the Bank did not promise to pay any bills from its own funds.

Needless to say the purpose of Rule 52(a) was to prevent such a radical overturning of the trial court's findings of fact without first establishing same were clearly erroneous. This is especially so where, as here, the lower court's findings took into account the truthfulness and demeanor of the witnesses.

The number of cases on this point is voluminous, but the Court is directed to a few of them, one of which is *United States* v. *Yellow Cab Co.*, (1949) 338 U.S. 338, 70 S. Ct. 177, 94 L. ed. 150, wherein Justice Jackson stated:

> "Findings as to design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends."
>
> ". . . While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion, either way, but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the evidence is not clearly erroneous."

And, *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, (1950) 339 U.S. 605, 70 S. Ct. 854, 94 L. ed. 1097, wherein it is stated:

> "A finding of equivalence is a determination of fact. Proof can be made in any form: Through testimony of experts or others versed in the technology; by docu-

ments; including tests and treatises; and, of course, by the disclosures of the prior act. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. . . ."

See also:

United States v. *National Assn. of Real Estate Bds.*, (1950) 339 U.S. 485, 70 S. Ct. 711, 94 L. ed. 1007.

Joseph v. *Danover*, (CCA 9th, 1958) 261 F.2d 812.

Cleo Syrup Corp. v. *Coca-Cola Co.*, (CCA 8th, 1943) 139 F.2d 416, 150 ALR 1052, cert. den. (1944) 321 U.S. 781, 64 S. Ct. 638, 88 L. ed. 1074.

Shapiro v. *Rubens*, (CCA 7th, 1948) 166 F.2d 659.

Hicks v. *Town of Hudson*, (CCA 10th, 1967) 390 F.2d 84.

Leach v. *Crucible Center Co., et al.*, (CCA 1st, 1968) 388 F.2d 176.

Glens Falls Ins. Co. v. *Newton Lumber & Mfg. Co., et al.*, (CCA 10th, 1967) 388 F.2d 66.

Since the lower court's findings of fact were not shown to be erroneous they must stand. Having stated this, one is led to an inescapable conclusion the 10th Circuit's decision must be reversed and the district court's decision reinstated.

As an adjunct to this problem, appellant desires to point out that "Morrison" nowhere challenged the lower court's findings as being unsupported or erroneous. As is stated in Vol. 2b, *Barron & Holtzoff, Federal Practice and Procedure*, page 516:

"Where the findings of the trial court are not challenged on appeal, the reviewing court is concerned only with the legal conclusions to be drawn from the facts as found."

Osborn v. *Sinclair*, 286 F.2d 832, cert. den. 366 U.S. 963.
Fleming v. *Munsingwear*, 162 F.2d 673.
Federal Savings & Loan v. *1st Nat. Bank*, 164 F.2d 929.
Anderson v. *Fed. Cartridge Corp.*, 156 F.2d 681.

Thus, it is clear the findings of fact must stand. This Court should exercise its power to supervise the lower court and alleviate an inequitable result not based on accepted judicial standards.

POINT III

The Court of Appeals based its decision in this case on its belief that "Morrison's" performance of its contract with "Cisco" constituted a good and sufficient consideration to support the promise of the Bank to pay. In support of what they consider to be the best view of the law, they quote Sec. 84(d) of the American Law Institute on Restatement of Contracts.

We have no quarrel with the Restatement except to say that it is extremely general and that in applying it, the Court of Appeals has been led into a misconception of the law and of its meaning. Sec. 84 is silent on whether there should be knowledge of an intended non-performance of the obligor prior to, and as an inducement to, the making of the promise. All cases we have read which allow such a promise to be supported by consideration are cases which involve an independent promise after there is knowledge of an intended rescission or non-performance. Such is the rule laid down by 17 *Am. Jur. 2d*, Contracts, Sec. 123, cited by the Circuit Court, even though that court failed to understand the distinction. Thus, we say, until the promisor has some knowledge the contract might not be performed, he receives no benefit for his promise; there is no bargain where the promisee only does what he intended

to do anyway. This is borne out by what Professor Corbin says at Sec. 176:

> "The performance is *bargained for,* it is beneficial to the promisor, the promisee has *forborne,* to seek a rescission or discharge from the third person to whom the duty was owed." (Emphasis ours.)

What we believe is meant both by the authors of the Restatement and Professor Corbin and which was misconstrued by the 10th Circuit, is the promisor receives a benefit when he, by his promise, induces a performance which he does not otherwise expect. If he had no reason to suspect a rescission or non-performance, how is he benefited; the promisee receives a detriment when he gives up his right of rescission or non-performance in reliance on the promise of the third party. (This implies not only he expects to rescind or not to perform, but in some way the promisor must know of this expectation and induce him not to rescind or not to perform.)

None of the cases cited by the 10th Circuit nor read by ourselves have found consideration for a third party's performance unless the promisee either had declined to perform or the third party knew of his intention not to perform prior to making his promise. Such a situation is wholly lacking in our case. Not one shred of evidence was produced to show that the Bank had any knowledge "Morrison" did not intend to perform prior to sending its letter of June 11, 1962. The mere fact that after "Morrison" wrote its letter of inquiry of May 9, 1962, to the Bank and it later on May 15, 1962, entered into a written contract with "Cisco" we believe shows conclusively "Morrison" had no intention of not performing when it wrote to the Bank. This is what the District Court found in findings of fact Nos. 13 and 14. What Mrs. Herrin may have decided later

after receiving the Bank's letter would of course be immaterial.

Every case cited by Professor Corbin as supporting a consideration for a third party's promise, involved an independent promise by a third party after he had knowledge the contract was not to be performed.

See:

Abbott v. *Doane,* 40 N.E. 197, 163 Mass. 433 (1895).

Joseph Lande & Son v. *Wellsco Realty,* 34 A.2d 418, 131 N.J.L. 191 (1943).

DeCicco v. *Schweizer,* 117 N.E. 807, 221 N.Y. 431 (1917).

Keane v. *Fidelity Sav. & Loan Ass'n,* 22 P.2d 59, 173 Wash. 199 (1933).

Const. Co. v. *O'Brien,* 117 Fed. 271 (1902).

Briskin v. *Packard Motor Car Co.,* 169 N.E. 148, 269 Mass. 394 (1929).

Also see:

Willard v. *Hobby,* 134 F. Supp. 66.

City National Bank & Trust Co. of Salem v. *Hassler,* 9 N.J. Super. 153, 75 A.2d 546.

Cited and distinguished in our brief to the Circuit Court.

POINT IV

As to the part of the decision of the Circuit Court which held that the letters between the Bank and "Morrison" created an equitable lien which became effective as soon as the Government paid the money to the Bank, see 33 *Am. Jur.,* Liens, Sec. 20, where it is stated:

> "In order to create an equitable lien by agreement it is essential that the property or fund sought to be

charged be distinctly appropriated to or as security for the payment of the debt or other liability in question. A mere expectation, *or even an agreement, that a debt will be paid out of a particular fund, a mere promise by a debtor to pay a debt out of a particular fund due him, as soon as he receives it,* and a promise to pay a certain debt out of the proceeds of the sale of certain property *have been held respectively, not to be a sufficient appropriation to create a lien thereon.*" (Emphasis ours.)

If, as argued in our point III, there was no consideration for the agreement by the Bank to pay, then there could be no equitable lien by express contract; for as stated at 58 *C.J.S.*, Liens, Sec. 4b:

"An equitable lien may arise from an express contract based on a valuable and adequate consideration. As a general rule any express executory contract whereby one party clearly indicated an intention to charge or appropriate some particular property, real or personal, therein described or identified, as security for a debt or other obligation, or whereby one party promises to assign, convey, or transfer the property as security for such a debt or obligation creates an equitable lien on the property as indicated. *An intention to create a charge or lien on the property must clearly appear, from the language of the instrument and the attendant circumstances, strict proof of such intention being required.*" (Emphasis ours.)

The inquiry naturally follows, does the Bank's letter of June 11, 1962, show an intention to charge a lien on the monies to be received from the government? We say it does not. It may indicate an intent to pay therefrom but how can a lien or security be implied from the Bank's letter. As stated at 53 *C.J.S.*, Liens, Sec. 4b(2):

"It is also essential that the contract make a distinct appropriation of the fund pro tanto, either by giving

> an order thereon or by otherwise transferring it in such manner as in effect to constitute an equitable assignment and authorize the holder of the fund or property to pay the amount directly to the creditor."

The Bank's letter is void of any verbiage which would set aside a specific part of the Government's payment for "Morrison", nor does the letter indicate any definite amount to be set aside. As is clearly indicated in *Re Interborough Consolidated Corp.*, 288 Fed. 344, cert. denied 262 U.S. 752, 67 L. ed. 1215, 43 S. Ct. 700, there must be an agreement that specific property be segregated and held to secure the debt which they could have taken possession of to secure their claims.

By what stretch of the imagination can you say the wording of the Bank's letter of June 11, 1962, "I can assure you that once the money is received from the Forest Service, we will pay *all* the bills submitted without delay," constitutes a segregation of any part of the money for "Morrison" such that they could have taken possession of it. How can you say these words show an intention to create a lien or security? If so, what part of the fund was segregated? In what amount; the $6,000-$9,000 mentioned in "Morrison's" letter of May 9, 1962? Certainly it could not have been the $14,424 plaintiff is now claiming and to which the Circuit Court held an express equitable lien existed.

It should be noted that there are three factors in this case which distinguished it from an ordinary equitable lien case:

1. The Bank was not the owner of the fund and was promising to pay another's obligation from monies not belonging to the Bank.

2. The Bank's promise was not to pay just "Morrison's" bill, but *"all"* bills.

3. The only amount contemplated by the parties was a $6,000-$9,000 bill—which the Bank has the money to pay.

For the above reasons we feel that the Circuit Court has misconstrued the law applicable to equitable liens and should not have concluded that such a lien existed in favor of "Morrison."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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